



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 29, 1993

Ms. Annette Jones  
Police Legal Advisor  
Legal Services  
P.O. Box 2570  
Waco, Texas 76702-2570

OR93-117

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).<sup>1</sup> Your request was assigned ID# 18309.

The City of Waco (the "city") has received three requests for certain arrest forms, police reports, and documents relating to certain police department investigations. Specifically, the requestor seeks:

1. Arrest forms on Calvin Washington;
2. Police reports and documents related to Cause No. 87-008-C, formerly Cause No. 86-565-C;
3. Arrest forms on Joe Sydney Williams;
4. Police reports and documents related to Cause No. 87-009-C, formerly Cause No. 86-569-C;
5. Arrest forms on Victor Gerome Gore; and
6. Police reports and documents in Waco Police Department case number 82-07-25720, District Court Cause No. 79-306-C, District Court Cause No. 79-306-C, District Court Cause No.

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<sup>1</sup>The Seventy-Third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

76-54-C, and any other information regarding Victor Gerome Gore as a suspect in the murder of Kenneth Franks, Jill Montgomery, and Raylene Rice.

You advise us that the request is unclear with respect to items 2, 4, and 6<sup>2</sup> and that some of the requested information is not in your possession.<sup>3</sup> You claim that the remaining information is excepted from required public disclosure by former sections 3(a)(3) and 3(a)(8) of the Open Records Act (now found at sections 552.103 and 552.108, respectively, of the Government Code).

You advise us that the remaining information relates to three separate cases in which Calvin Washington, Joe Sydney Williams, David Wayne Spence, and Muneer Mohammad Deeb were convicted of capital murder. You claim that this information is excepted from required public disclosure by section 552.103 of the Open Records Act. To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision Nos. 588 (1991); 452 (1986). Further, section 552.103(b) of the Government Code provides:

For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

At the time of your request for an open records decision, you had originally advised this office that none of the above listed criminal defendants had exhausted their appellate and postconviction remedies in state and federal court. Mr. William Zapalac, the assistant attorney general who is currently representing the state in a habeas corpus

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<sup>2</sup>You advise us that the city police department does not index cases using the district court docket numbers and thus has no way of locating information responsive to items 2 and 4 and portions of item 6 of the request. You also advise us that there are at least two persons each with the names Joe Sydney Williams and Calvin Washington and that the requestor has provided no identifying information other than the arrestees' names that would permit you to determine to whom the requestor refers in his request. A governmental body is obligated to make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 (1990) at 8. When a governmental body is presented with an unclear request for information rather than for specific records, it should advise the requestor of the types of information available so that he may narrow his request. *Id.* at 9. Once you have clarified the contents of the request, you must release the requested information within ten days or request an open records decision from this office.

<sup>3</sup>You advise us that the city is not in possession of arrest forms for Victor Gerome Gore, Calvin Washington, and Joe Sydney Williams and claim that you are therefore not required to respond to items 1, 3, and 5 of the request. We agree. The Open Records Act does not require a governmental body to make available information that does not exist, Open Records Decision No. 362 (1983), or to obtain information not in its possession, Open Records Decision No. 558 (1990).

action filed by David Wayne Spence, has informed us that, since the time of your request for a decision, the other three criminal defendants have each had their criminal convictions reversed and that no other criminal litigation regarding those individuals is pending at this time. Accordingly, the state is considered a party to litigation only with regard to David Wayne Spence. *See* Open Records Decision Nos. 469, 433 (1986).

However, Mr. Zapalac has demonstrated to this office the relevancy of the records of the department's investigation into the murder of Juanita White, of which Calvin Washington and Joe Sydney Williams were originally convicted, to the pending habeas corpus proceeding. We conclude, therefore, that the department's records of the Juanita White murder and the "Lake Waco Murder" relate to the pending habeas corpus proceeding for purposes of section 552.103.

Mr. Zapalac informs us that some of the requested records have already been released to Mr. Spence during discovery. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Consequently, to the extent that Mr. Spence or his attorney have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103. Further, you have not demonstrated to this office how the release of the records provided to Mr. Spence would "unduly interfere" with law enforcement. Open Records Decision Nos. 434 (1986); 287 (1981). Therefore, you must contact Mr. Zapalac to determine the precise records that have previously been released to Mr. Spence. You must release those records in turn to the requestor. The city may withhold all remaining records pursuant to section 552.103.<sup>4</sup>

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

  
Rebecca L. Payne  
Section Chief  
Open Government Section

RLP/RWP/GCK/rho

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<sup>4</sup>Please note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Ref.: ID# 18309

Enclosure: Submitted document

cc: Mr. J. Neil Hartley  
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(w/o enclosure)

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